Supreme Court, U.S.
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No. 98-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

Brenda Shempert and Lynne Gibel,
Petitioners,

v.

Harwick Chemical Corporation and Tom Breckenridge,
Respondents.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Jonathan D. Schiller
Thomas C. Goldstein
BOIES & SCHILLER LLP
5301 Wisconsin Ave., NW
Suite 570
Washington, DC 20015

David Boies
(Counsel of Record)
BOIES & SCHILLER LLP
80 Business Park Dr.
Suite 110
Armonk, NY 10504
(914) 273-9800

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QUESTION PRESENTED

Title VII requires a complainant to file a charge of discrimination within 180 days of an unlawful employment practice. The statute separately provides that a complainant's charge must be sworn or verified. In this case, Petitioner Shempert submitted her charge within 180 days, but did not verify it until just after the 180-day time limit expired. Petitioner's charge was nonetheless valid under an EEOC regulation that permits complainants subsequently to cure their technical failure to submit a sworn or verified version of the charge. *See* 29 CFR 1601.12(b). Six circuits have sustained the regulation as a valid exercise of the EEOC's discretion, and the EEOC appeared as *amicus curiae* in this case to defend the regulation. The Eighth Circuit, however, refused to follow the regulation, expressly rejecting the contrary view of every other circuit that has addressed the question.

The questions presented are:

1. Whether the Eighth Circuit erred in rejecting the view of six other circuits that 29 CFR 1601.12(b) is a valid regulation interpreting the filing requirements of Title VII?

2. Whether Petitioner Shempert's claims were timely filed under the doctrine of equitable tolling, given that she complied with the EEOC's own controlling regulation?

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No. 98-___

IN THE

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OCTOBER TERM, 1998

Brenda Shempert and Lynne Gibel,
Petitioners,

v.

Harwick Chemical Corporation and Tom Breckenridge,
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Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Brenda Shempert and Lynne Gibel respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The district court's opinion (Pet. App. 12a-19a (per Webber Wright, J.)) is unpublished. The Eighth Circuit's opinion (Pet. App. 1a-11a (per McMillian, J., joined by Wollman, J., and Stevens, D.J.)) is published at 151 F.3d 793.

JURISDICTION

The Eighth Circuit entered its judgment on July 31, 1998. Petitioner invokes the jurisdiction of this Court under 28 USC 1254(1).

STATUTE AND REGULATION INVOLVED

The statute relevant to this case, 42 USC 2000e-5(b), 5(e)(1), provides in relevant part:

> (b) **Charges by persons aggrieved** . . . . Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires.
>
> * * * *
>
> (e)(1) A charge filed under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . .

The regulation relevant to this case, 29 CFR 1601.12(b), which the EEOC promulgated pursuant to 42 USC 2000e-5(b), 5(e)(1), provides in relevant part:

> A charge may be amended to cure technical defects or omissions, including failure to verify the charge . . . . Such amendments . . . will relate back to the date the charge was first received.

STATEMENT

1. Petitioner Brenda Shempert worked as a Senior Customer Service Representative for Respondent Harwick Chemical Corporation ("Harwick") from 1983 until she resigned in May 1996. This case arises from her allegation that during 1994 and 1995 she was subjected to sexual harassment by her supervisor, Respondent Tom Breckenridge ("Breckenridge") and that no corrective action was taken by either Harwick or Breckenridge despite her repeated complaints. The harassment included unwelcome sexual advances, physical touching, verbal harassment, and other sexually explicit conduct, which Petitioner Shempert alleged put her in fear for her personal health and safety, forced her to take a medical leave of absence, and compelled her to seek the care of a physician. Pet. App. 3a.

The last act of discrimination alleged by Petitioner Shempert occurred on May 15, 1995. Under Title VII, she then

had 180 days (*i.e.*, until November 11, 1995) to submit a charge of discrimination. 42 USC 2000e-5(e)(1). Ms. Shempert therefore filled out, signed, and mailed to the EEOC an unsworn "Intake Questionnaire," which the agency received on November 2, 1995. Pet. App. 3a.

In response, the EEOC prepared a "Charge of Discrimination" form, which it sent to Petitioner Shempert on November 7, 1995, with the request that she sign and date it. In an accompanying letter, the EEOC informed Petitioner Shempert that her charges could be dismissed if she did not respond within thirty days, and that the Charge of Discrimination form should be returned as soon as possible because it must be filed within the time limits imposed by law. Petitioner Shempert signed the Charge of Discrimination form, and verified its accuracy, on November 16, 1995. She mailed it to the EEOC on November 27, which received the form on November 30. Pet. App. 3a-4a.

Petitioner's filing of the sworn Charge of Discrimination form resulted in a valid charge under 29 CFR 1601.12(b). That regulation provides: "A charge may be amended to cure technical defects or omissions, including failure to verify the charge . . . . Such amendments . . . will relate back to the date the charge was first received." The basis for the regulation is that although Title VII "does require that a complainant verify a charge, the statute does *not* require that the verification take place prior to the expiration of the [180-day] time period." *Philbin v. General Elec. Capital Auto Lease*, 929 F.2d 321, 324 (7th Cir. 1991) (per curiam) (emphasis added).

2. After the EEOC issued Petitioner Shempert a "right to sue letter," she instituted this action against Respondents. On Respondents' motion for summary judgment, however, the district court dismissed the complaint for failure to file a sworn or verified charge within 180 days of the last alleged act of discrimination. The court explained:

> Although other courts of appeals have ruled to the contrary, the rule in the Eighth Circuit is that intake questionnaires in Title VII cases do not satisfy

> the statutory requirements for a charge because they are not verified. *Hodges v. Northwest Airlines*, 990 F.2d 1030 (8th Cir. 1993) (stating that an unverified intake questionnaire could not serve as an administrative charge under Title VII); *Diez v. Minnesota Mining & Mfg. Co.*, 88 F.3d 672, 675 (8th Cir. 1996) (same).

Pet. App. 16a. The district court also concluded that Petitioner Shempert's failure to submit a timely sworn charge was not subject to equitable tolling, despite the fact that the EEOC's governing regulation expressly provides that "[a] charge may be amended to cure technical defects or omissions, including failure to verify the charge" and that "[s]uch amendments . . . will relate back to the date the charge was first received." 29 CFR 1601.12(b). Pet. App. 16a-17a & n:2.[1]

Supported by the EEOC as *amicus curiae*, Petitioners appealed. The Eighth Circuit affirmed, explaining that "[t]he case law in the Eighth Circuit is well settled on this issue":

> Intake Questionnaires which are neither signed under oath nor verified do not satisfy the statutory requirement for an administrative charge. *See Lawrence v. Cooper Communities, Inc.*, 132 F.3d 447, 450 (8th Cir. 1998) (*Lawrence*); *Schlueter v. Anheuser-Busch, Inc.*, 132 F.3d 455, 458 (8th Cir. 1998) (*Schlueter*); *Diez*, 88 F.3d at 675. Title 42 U.S.C. § 2000e-5(b) requires that all administrative charges be "in writing under oath or affirmation."

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[1] Petitioner Lynne Gibel (a former bookkeeper at Harwick) is a party here because she had sought to intervene in the district court by "piggybacking" on Petitioner Shempert's administrative charge. The district court denied the motion to intervene when it ruled that Petitioner Shempert's claims must be dismissed. Pet. App. 19a. The Eighth Circuit subsequently affirmed on the same ground. *Id.* 10a-11a.

The district court separately dismissed the complaint against Respondent Breckenridge on the ground that "a supervisor cannot be held individually liable as an 'employer' under Title VII." Pet. App. 18a. The Eighth Circuit did not discuss this holding. Petitioners have named Respondent Breckenridge (who is represented by common counsel with Respondent Harwick) as a party in this Court to ensure that he is bound by any ruling in this case and remains a party on any remand.

> Only when an Intake Questionnaire is signed under oath can it "constitute a valid charge under Title VII for purposes of the statute of limitations." *Lawrence*, 132 F.3d at 150 (quoting *Hodges*, 990 F.2d at 1032). Shempert's Intake Questionnaire was never signed under oath or verified. The verification requirement of 42 U.S.C. § 2000e-5(b), as construed by this circuit, requires us to hold that Shempert's Intake Questionnaire did not constitute a valid charge under Title VII.

Pet. App. 6a. The Eighth Circuit expressly recognized, however, that the substantial majority of circuits reach the opposite conclusion. These circuits adhere to the EEOC's regulation and permit a subsequent verified charge to relate back to the date of an initial, unverified Intake Questionnaire:

> Other circuits have held that a timely-filed Intake Questionnaire can serve as an administrative charge if subsequently verified. *See Philbin v. General Elec. Capital Auto Lease, Inc.*, 929 F.2d 321 (7th Cir. 1991) (per curiam); *Peterson v. City of Wichita*, 888 F.2d 1307 (10th Cir. 1989) (Title VII case involving discrimination based on race), *cert. denied*, 495 U.S. 932 (1990). Still other circuits have held that an Intake Questionnaire qualifies as a charge if it satisfies the requirements of 29 C.F.R. § 1601.12(b). *See Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1239-41 (11th Cir. 1989) (Age Discrimination in Employment Act (ADEA) claim); *Casavantes v. California State Univ.*, 732 F.2d 1441 (9th Cir. 1984). Some circuits have also held that an unverified charge can be verified after the filing period has expired through equitable tolling. *See Early v. Bankers Life & Cas. Co.*, 959 F.2d 75 (7th Cir. 1992).

Pet. App. 6a-7a.

The Eighth Circuit also rejected the argument that Petitioner Shempert's claim was timely filed under the doctrine of equitable tolling. Petitioner explained both that her claim

satisfied the express terms of 29 CFR 1601.12(b) and also that the EEOC had written to her that the Charge of Discrimination form should be filed within thirty days, not sooner. According to the court of appeals, however, equitable tolling is inapplicable because Respondents "did not engage in affirmative misconduct which might have lulled Shempert into inaction." Pet. App. 9a. Moreover, although the EEOC's letter stated that Petitioner should respond within thirty days, which she did, the Eighth Circuit emphasized that the letter also provided that the charge must be filed within the time limits imposed by law. Thus, "the EEOC did not mishandle her claim or otherwise mislead her into inaction." *Id.* 9a.

This Petition followed.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted in this case because the ruling below conflicts with decisions of six other circuits. This conflict seriously interferes with the orderly, national administration of Title VII.

1. 29 CFR 1601.12(b), which the EEOC promulgated pursuant to Title VII, expressly provides that the subsequent verification of a charge of discrimination relates back to an earlier filed charge. *Only* the Eighth Circuit refuses to adhere to the regulation.[2] Prior to the Eighth Circuit's holding, "Every circuit which ha[d] considered the issue ha[d] decided in favor of the validity of the regulation, concluding that an unverified charge is a timely filing if it is subsequently amended by a charge executed under oath or affirmation." *Peterson v. City of Wichita, Kan.*, 888 F.2d 1307, 1308-09 (10th Cir. 1989), *cert. denied*, 495 U.S. 932 (1990). As one district court has

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[2] We acknowledge that the D.C. Circuit has stated that "Title VII requires charges to be sworn, 42 U.S.C. § 2000e-5(b)." *Park v. Howard Univ.*, 71 F.3d 904 (1995), *cert. denied*, 117 S. Ct. 57 (1996) (citing *Hodges v. Northwest Airlines*, 990 F.2d 1030 (8th Cir. 1993)). *See* Pet. App. 6a n.7, 16a n.1. Although *Park* involved an unsworn Intake Questionnaire, the court's statement was unnecessary to its holding and therefore was dictum. Of note, the D.C. Circuit did not discuss or purport to disagree with the uniform holding of every circuit except the Eighth that relation back is permitted.

explained, the Eighth Circuit's failure to permit relation back conflicts with "the overwhelming authority in support of this conclusion." *Whitekiller v. Campbell Soup*, 925 F. Supp. 614, 616 (W.D. Ark. 1996). *Accord Philbin v. General Elec. Capital Auto Lease*, 929 F.2d 321, 324 (7th Cir. 1991) (as of 1991, "The circuit courts of appeals that ha[d] addressed the issue [held] that the EEOC has the power to decide that a subsequent verification of a written statement relates back to the date of the initial filing and satisfies the statutory requirement"); *NAACP Labor Comm. v. Laborers' Int'l Union*, 902 F. Supp. 688, 704 (W.D. Va. 1995) ("Several courts of appeal have relied on the EEOC regulations to permit the subsequent verification of a charge." (citing *Philbin*, 929 F.2d 321 (7th Cir.); *Peterson*, 888 F.2d 1307 (10th Cir.); *Casavantes*, 732 F.2d 1441 (9th Cir.); *Price*, 687 F.2d 74 (5th Cir.)).

Specifically, the Fourth, Fifth, Seventh, Ninth and Tenth Circuits all have sustained 29 CFR 1601.12(b) as a reasonable interpretation of Title VII. *Balazs v. Liebenthal*, 32 F.3d 151, 157 (4th Cir. 1994) (sustaining section 1601.12(b) insofar as it permits relation back "so long as the charge is a viable one in the EEOC's files")[3]; *Philbin v. General Elec. Capital Auto Lease*, 929 F.2d 321, *supra* (7th Cir.)[4]; *Peterson v. City of Wichita, Kan.*, 888 F.2d 1307, *supra* (10th Cir.); *Casavantes v. California St. Univ.*, 732 F.2d 1441, 1443 (9th Cir. 1984) ("We are thus led to the inescapable conclusion that the completed Intake Questionnaire, in the context of both the amendment

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[3] The opinion below suggests that the Fourth Circuit generally does not permit a complainant to verify an earlier charge after the 180-day period has expired. Pet. App. 6a n.7 (citing *EEOC v. Appalachian Power Co.*, 568 F.2d 354, 355 (4th Cir. 1978) (per curiam)). More recently, however, the Fourth Circuit has held that 29 CFR 1601.12(b) is valid and clarified that *Balazs v. Liebenthal*, 32 F.3d 151, *supra* (4th Cir.), "approv[ed] the very use of the regulation." *Tinsley v. First Union Nat'l Bank*, No. 97-2640, 1998 U.S. App. LEXIS 21407, at *6 n.2 (4th Cir. Sept. 2, 1998). *See also Crites v. Kaiser Alum. & Chem. Corp.*, No. 91-1231 (4th Cir. Apr. 3, 1992).

[4] *See also Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 80-81 (7th Cir. 1992) (per Posner, J.); *Perkins v. Silverstein*, 939 F.2d 463, 470 (7th Cir. 1991); *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534 (7th Cir. 1988), *cert. denied*, 491 U.S. 907 (1989).

procedures and the liberality to be ascribed to the procedural requirements, is sufficient to constitute a charge.")[5]; *Price v. Southwestern Bell Telephone Co.*, 687 F.2d 74, 77 (5th Cir. 1982) ("Because of the regulatory provision for cure of technical or procedural defects in 29 C.F.R. § 1601.12(b), we do not, in keeping with our past decisions, view the verification element as jurisdictional."). The Sixth Circuit permitted this practice even before the adoption of the EEOC regulation. *Blue Bell Boots v. EEOC*, 418 F.2d 355, 357 (6th Cir. 1969) ("Such a construction recognizes the remedial nature of the statute and does not prejudice an unwary victim of discrimination by insistence upon a formal requirement which can be supplied before the respondent is brought into the picture."). In three of the circuits that have not addressed the question – the Second, Third, and Eleventh[6] – district courts similarly have sustained the EEOC regulation and permitted relation back.[7]

2. This conflict creates a serious impediment to the orderly administration of Title VII, which is the country's principal and most-often-invoked civil rights statute. The EEOC has promulgated a single, national regulation governing compliance with the statute's 180-day deadline. In some parts of the country, however, complainants will have their claims dismissed notwithstanding their full and complete compliance with the regulation. The EEOC has been forced to appear in no

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[5] *See also Allen-Bell v. Topolinski*, No. 97-15268 (9th Cir. Aug. 25, 1997); *Simmons v. United Airlines*, No. 96-16753 (9th Cir. Apr. 24, 1997); *Merten v. Amtrak*, No. 93-56442 (9th Cir. June 24, 1994).

[6] The Eleventh Circuit has not addressed this question in the context of Title VII, but has permitted this form of relation back pursuant to a parallel regulation regarding claims under the ADEA. *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237 (1989).

[7] *Halas v. Ford Motor Co.*, 987 F. Supp. 227, 233 (W.D.N.Y. 1997) (citing *Philbin, supra*; *Peterson, supra*; *Price, supra*; *Casavantes, supra*); *Danley v. Book-Of-The-Month Club*, 921 F. Supp. 1352, 1353 (M.D. Pa. 1996) ("We agree that, under section 1601.12(b), a plaintiff can verify his or her charge while the EEOC is investigating the claim."), *aff'd without op.*, 107 F.3d 861 (3d Cir. 1997); *Montgomery v. Atlanta Family Restaurants*, 752 F. Supp. 1575 (N.D. Ga. 1990) (applying regulation to permit verified charge to relate back to earlier letter to EEOC).

less than a half-dozen appellate cases to defend the regulation.[8] The uncertainty surrounding 29 CFR 1601.12(b) also is demonstrated by the extraordinary amount of litigation regarding the question.[9] *Accord Diez v. Minnesota Mining & Mfg. Co.*, 88 F.2d 672, 674-75 & n.2 (8th Cir. 1996) ("The issue of whether EEOC and state agency intake questionnaires can serve as administrative charges has been widely litigated.").

3. Certiorari also is warranted because the decision below is erroneous. Other circuits uniformly have accorded the EEOC's regulation the deference it is due under *Chevron, U.S.A. v. NRDC*, 467 U.S. 837 (1984). As we noted earlier, although the Eighth Circuit is correct that "the statute does require that a complainant verify a charge, the statute does *not* require that the verification take place prior to the expiration of the [180-day] time period." *Philbin*, 929 F.2d at 324 (7th Cir.) (emphasis added). Given the statute's ambiguity, the EEOC reasonably has interpreted Title VII in light of its remedial purpose: the regulation ensures not only that employers are on notice of the charges against them within 180-days, but also

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[8] In addition to this case, see *Lawrence v. Cooper Communities*, 132 F.3d 447 (8th Cir. 1998); *Balazs v. Liebenthal*, 32 F.3d 151, *supra* (4th Cir.); *Philbin v. General Elec. Capital Auto Lease*, *supra* (7th Cir.); *Peterson v. City of Wichita, Kan.*, 888 F.2d 1307, *supra* (10th Cir.); *Clark v. Coasts & Clark, Inc.*, 865 F.2d 1237, *supra* (11th Cir.).

[9] For cases decided within the past several years, see, for example, *Taylor v. Professional Collision Servs., Inc.*, 1998 U.S. Dist. LEXIS 16353 (S.D. Ala. 1998); *Shelton v. University of South Alabama*, 1997 U.S. Dist. LEXIS 15684 (S.D. Ala. 1997); *Danley v. Book-Of-The-Month Club, Inc.*, 921 F. Supp. 1352 (M.D. Pa. 1996), *aff'd without op.*, 107 F.3d 861 (3d Cir. 1997); *Halas v. Ford Motor Co.*, 987 F. Supp. 227 (W.D.N.Y. 1997); *Gonzalez v. Celanese*, 1997 U.S. Dist. LEXIS 21522 (S.D. Tex. 1997); *Whitekiller v. Campbell Soup, Inc.*, 925 F. Supp. 614 (W.D. Ark. 1996); *Greenwell v. Raytheon Aerospace, Inc.*, 1996 U.S. Dist. LEXIS 12550, *mot. for new trial granted, in part, mot. denied*, 1996 U.S. Dist. LEXIS 18564 (E.D. La. 1996); *NAACP Labor Comm. of Fort Royal v. Laborer's Int'l Union of North America*, 902 F. Supp. 688 (W.D. Va. 1995); *Bacon v. Allstate Ins. Co.*, 1995 U.S. Dist. LEXIS 8168 (N.D. Ill. 1995); *Brown v. Packaging Corp. of Am.*, 846 F. Supp. 592 (M.D. Tenn. 1993); *Gomez v. Amoco Oil Co.*, 767 F. Supp. 191 (N.D. Ind. 1991); *EEOC v. Dillard Dep't Stores*, 768 F. Supp. 1247 (W.D. Tenn. 1991); *French v. Syncor Int'l Corp.*, 1990 U.S. Dist. LEXIS 5428 (N.D. Ill. 1990); *Montgomery v. Atlanta Family Restaurants*, 752 F. Supp. 1575 (N.D. Ga. 1990).

that legitimate claims are not dismissed for failure to abide by technical filing requirements. *Accord Price*, 687 F.2d at 78 (the "principal function of the administrative charge" is "the provision of an adequate factual basis for the Commission's initiation of the investigatory and conciliatory procedures contemplated by Title VII"). As this Court concluded in *Zipes v. TWA*, 455 U.S. 385, 396-97 (1982), it is inappropriate to adopt a technical construction of Title VII's filing provisions, given that laymen initiate the statutory process.[10]

At the very least, the Eighth Circuit should have concluded that Petitioner Shempert's claim was timely filed under the doctrine of equitable tolling. There is no question that Petitioner complied fully and completely with a binding federal regulation regarding the filing of her Title VII claim. The Eighth Circuit's suggestion that "the EEOC did not mishandle her claim or otherwise mislead her into inaction" (Pet. App. 9a) is incorrect. The EEOC correctly handled Petitioner's claim under its own procedures, and Petitioner relied on the EEOC's direction. Petitioner complied with not only 29 CFR 1601.12(b) but also the EEOC's instruction to return the verified Charge of Discrimination form within thirty days. Although the EEOC also instructed Petitioner that her charge must comply with the time limits set by law, it certainly was reasonable for Petitioner to trust the EEOC's representations regarding what those time limits were. When as here a court *later* concludes that the EEOC has acted inappropriately by not following its statutory mandate, it is inequitable to punish a complainant for the agency's actions. In this respect, the decision below conflicts with long-standing precedents of other circuits, which hold that equitable tolling applies when a party relies on agency policies and regulations. *See, e.g., Roberts v. Arizona Bd. of Regents*, 661 F.2d 796 (9th Cir. 1981); *White v. Dallas Indep. Sch. Dist.*, 581 F.2d 556 (5th

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[10] Another panel of the Eighth Circuit went so far as to acknowledge that this "argument appears well taken," but nonetheless refused to adhere to the regulation because "we are bound by Eighth Circuit case law which holds that 'in Title VII cases, intake questionnaires do not satisfy the statutory requirements for a charge because they are not verified.'" *Schlueter v. Anheuser-Busch*, 132 F.3d at 458.

Cir. 1978); *Ferguson v. Kroger Co.*, 545 F.2d 1034 (6th Cir. 1976); *Dematteis v. Eastman Kodak Co.*, 520 F.2d 409 (2d Cir. 1975).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Jonathan D. Schiller
Thomas C. Goldstein
BOIES & SCHILLER LLP
5301 Wisconsin Ave., NW
Suite 570
Washington, DC 20015

David Boies
(Counsel of Record)
BOIES & SCHILLER LLP
80 Business Park Dr.
Suite 110
Armonk, NY 10504
(914) 273-9800

October 29, 1998

Brenda Shempert, Plaintiff-Appellant, v.
Harwick Chemical Corporation and Tom Breckenridge, Individually; Defendant-Appellee, Lynne Gibel, Movant-Appellant. Equal Employment Opportunity Commission, Amicus Curiae.

No. 97-1634

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

151 F.3d 793

July 31, 1998, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Arkansas. H-C-96-37. Honorable Susan Webber Wright.

DISPOSITION: Affirmed.

COUNSEL: Counsel who represented the appellant was Ronald Scott Waddell of Jonesboro, Arkansas. Counsel who represented the appellee was Dean Westman of Cleveland, Ohio. Lisa A. Kainec and Kent J. Rubens appeared on the brief.

JUDGES: Before McMILLIAN and WOLLMAN, Circuit Judges, and STEVENS,[1] District Judge.

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[1] The Honorable Joseph E. Stevens, Jr., United States District Judge for the Western District of Missouri, sitting by designation.

McMILLIAN, Circuit Judge.

Brenda Shempert appeals from a final order issued in the United States District Court for the Eastern District of Arkansas granting summary judgment in favor of [2] defendants Harwick Chemical Corporation (Harwick) and Tom Breckenridge, individually, and denying Lynne Gibel's motion to intervene. *Shempert v. Harwick Chem. Corp.*, No. H-C-96-37 (E.D. Ark. Dec. 27, 1996) (Order) (hereinafter "slip op."). The district court dismissed Shempert's claim of sexual harassment employment discrimination under 42 U.S.C. §§ 2000e to 2000e-17 (Title VII), holding that Shempert failed to file an administrative charge within 180 days of the last alleged discriminatory incident as required by 42 U.S.C. § 2000e-5(e)(1). Slip op. at 6. For reversal, Shempert argues that the district court erred in holding that (1) her Intake Questionnaire, submitted to the Equal Employment Opportunity Commission (EEOC) within 180 days, did not constitute a valid administrative charge, and, alternatively, (2) the doctrine of equitable tolling did not apply to save her claim even if she failed to file an administrative charge within the 180-day filing period. For the reasons discussed below, we affirm the judgment of the district court.

Jurisdiction

Jurisdiction in the district court was proper based upon 28 U.S.C. § 1331. Jurisdiction in this court is proper based upon 28 U.S.C. § 1291. The notice of appeal was timely filed pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure.

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[2] The Honorable Susan Webber Wright, United States District Judge for the Eastern District of Arkansas.

Background

Shempert worked as a Senior Customer Service Representative for Harwick from 1983 until she resigned on May 7, 1996. She alleges that during 1994 and 1995 her supervisor, Breckenridge, repeatedly subjected her to unwelcome sexual advances, physical touching, verbal harassment, and other sexually explicit activities. She claims that despite repeated complaints to both Breckenridge and corporate officials at Harwick the harassment continued and no corrective action was taken. Shempert claims that the acts of sexual harassment put her in fear of her personal health and safety, forced her to take a medical leave of absence, and compelled her to seek the care of a physician.

Shempert obtained legal assistance on October 11, 1995. Her attorney discussed with her the procedures for filing an Intake Questionnaire or Charge Information Form provided by the EEOC. On October 30, 1995, Shempert went to her attorney's office where she was assisted in filling out an Intake Questionnaire, which she signed, but not under oath or affirmation. She alleged in the Intake Questionnaire that her employer's last act of discrimination occurred on May 15, 1995. The date of this alleged act of discrimination marked the beginning of the 180-day filing period in which she could file a valid administrative charge. The filing period, therefore, expired on November 11, 1995.

The EEOC received Shempert's completed and signed Intake Questionnaire on November 2, 1995. On November 9, 1995, the EEOC sent Shempert a letter and requested that she sign and date the attached Charge of Discrimination (Charge) form prepared for her. The letter warned her that a failure to respond within 30 days could result in the dismissal of her charges. In addition, the letter warned that the Charge had to be filed within the time limits imposed by law and, therefore, should be returned to the EEOC as soon as possible. Upon receipt of the letter, Shempert contacted her attorney. She signed the Charge form on November 16, 1995, and returned it

to the EEOC on November 27, 1995. Three days later, on November 30, 1995, the EEOC received the Charge form.

On January 24, 1996, the EEOC issued a "Notice of Right to Sue" letter and Shempert filed this action in federal district court against Harwick and Breckenridge on March 26, 1996. On November 27, 1996, Gibel, a former bookkeeper employed at Harwick, filed a motion to intervene. Defendants then filed a motion for summary judgment and the district court granted the motion, holding that Shempert's unverified Intake Questionnaire could not serve as an administrative charge for purposes of the 180-day statute of limitations. Slip op. at 6 (citing *Diez v. Minnesota Mining & Mfg. Co.*, 88 F.3d 672, 675 (8th Cir. 1996) (*Diez*), and *Hodges v. Northwest Airlines, Inc.*, 990 F.2d 1030, 1032 (8th Cir. 1993) (*Hodges*)). The district court also rejected Shempert's assertion that equitable tolling applied to preserve her claim. *Id.* at 8 n.2.

Because Shempert could not maintain her Title VII action, the district court also denied Gibel's motion to intervene. *Id.* at 9-10. This appeal followed.

Discussion

We review a grant of summary judgment de novo. The question before the district court, and this court on appeal, is whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50; *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir. 1992); *St. Paul Fire & Marine Ins. Co. v. FDIC*, 968 F.2d 695, 699 (8th Cir. 1992). Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate. *Crain v. Board of Police Comm'rs*, 920 F.2d 1402, 1405-06 (8th Cir. 1990).

Under Title VII, an administrative charge must be filed within 180 days of the alleged discriminatory incident.[3] 42 U.S.C. § 2000e-5(e)(1). In order to be valid, Title VII requires that "charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the [EEOC] requires." *Id.* § 2000e- 5(b). There is no dispute that the last alleged incident of discrimination occurred on May 15, 1995. The last day for Shempert to file a valid charge, therefore, was November 11, 1995. The parties also do not dispute that Shempert filed an Intake Questionnaire on October 30, 1995, within the 180-day filing period, and that she signed the Charge under affirmation or oath on November 16, 1995, after the 180-day filing period had expired. The only dispute in this case, therefore, is whether the Intake Questionnaire qualified as an administrative charge under the particular circumstances of this case.

Shempert contends that the district court should not have granted summary judgment on her Title VII claim because she filed an Intake Questionnaire within the 180-day filing period.[4] She argues that her Intake Questionnaire qualified as an administrative charge because it was a precise statement identifying the parties and describing the discriminatory activities, as required by 29 C.F.R. § 1601.12(b).[5] She further argues that, even though she did not sign the Intake Questionnaire under oath or affirmation, 29 C.F.R. §

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[3] There is no state or local fair employment practices agency in Arkansas. Therefore, Shempert had 180 days, as opposed to 300 days, after the alleged unlawful employment practice occurred to file her charge with the EEOC. *See* 42 U.S.C. § 2000e-5(e)(1).

[4] The EEOC has filed an amicus curiae brief in support of Shempert and submits essentially the same argument on appeal. Therefore, our discussion addresses these arguments simultaneously.

[5] The regulation provides in relevant part: "[A] charge is sufficient when the [EEOC] receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b).

1601.12(b) allows her to amend the Intake Questionnaire with the Charge signed on November 16, 1995, and, therefore, cure any defect by relating back to October 30, 1995.[6]

The case law in the Eighth Circuit is well settled on this issue. Intake Questionnaires which are neither signed under oath nor verified do not satisfy the statutory requirement for an administrative charge. *See Lawrence v. Cooper Communities, Inc.*, 132 F.3d 447, 450 (8th Cir. 1998) (*Lawrence*); *Schlueter v. Anheuser-Busch, Inc.*, 132 F.3d 455, 458 (8th Cir. 1998) (Schlueter); *Diez*, 88 F.3d at 675. Title 42 U.S.C. § 2000e-5(b) requires that all administrative charges be "in writing under oath or affirmation." Only when an Intake Questionnaire is signed under oath can it "constitute a valid charge under Title VII for purposes of the statute of limitations." *Lawrence*, 132 F.3d at 450 (*quoting Hodges*, 990 F.2d at 1032). Shempert's Intake Questionnaire was never signed under oath or verified. The verification requirement of 42 U.S.C. § 2000e-5(b), as construed by this circuit, requires us to hold that Shempert's Intake Questionnaire did not constitute a valid charge under Title VII.[7] Because Shempert's Intake Questionnaire did not

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[6] The regulation provides in relevant part: "A charge may be amended to cure technical defects or omissions, including failure to verify the charge . . . . Such amendments . . . will relate back to the date the charge was first received." 29 C.F.R. § 1601.12(b).

[7] Several circuits hold that an Intake Questionnaire cannot serve as an administrative charge. *See Park v. Howard Univ.*, 71 F.3d 904, 908-09 (D.C. Cir. 1995), *cert. denied*, 117 S. Ct. 57 (1996); *EEOC v. Appalachian Power Co.*, 568 F.2d 354, 355 (4th Cir. 1978) (per curiam) (holding that a charge not taken under oath or affirmation is not a valid charge). *But see Balazs v. Liebenthal*, 32 F.3d 151 (4th Cir. 1994) (holding that an invalid charge can be perfected through equitable tolling). Other circuits have held that a timely-filed Intake Questionnaire can serve as an administrative charge if subsequently verified. *See Philbin v. General Elec. Capital Auto Lease, Inc.*, 929 F.2d 321 (7th Cir. 1991) (per curiam); *Peterson v. City of Wichita*, 888 F.2d 1307 (10th Cir. 1989) (Title VII case involving discrimination based on race), *cert. denied*, 495 U.S. 932 (1990). Still other circuits have held that an Intake Questionnaire qualifies as a charge if it satisfies the requirements of 29 C.F.R. § 1601.12(b). *See Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1239-41 (11th Cir. 1989) (Age Discrimination in Employment Act (ADEA) claim); *Casavantes v. California State Univ.*, 732 F.2d 1441 (9th Cir. 1984). Some circuits have also held that an unverified charge can be verified after the filing period has expired through equitable tolling. *See Early v. Bankers Life & Cas. Co.*, 959 F.2d 75

constitute a charge under Title VII, her verified Charge of November 16, 1995, can not relate back to the filing of the Intake Questionnaire. *See Lawrence,* 132 F.3d at 450 (noting that an Intake Questionnaire is not a charge and 29 C.F.R. § 1601.12(b) only allows an amendment to relate back to the date a charge was first received); *Schlueter*, 132 F.3d at 458 (same).

Shempert urges us to apply the *Diez* test for distinguishing between questionnaires that are preliminary to an administrative charge and questionnaires that function as a charge. *Diez,* 88 F.3d at 676 (adopting the Seventh Circuit test from *Steffen v. Meridian Life Ins. Co.,* 859 F.2d 534, 542 (7th Cir. 1988) (*Steffen*), *cert. denied,* 491 U.S. 907 3191 (1989)). Shempert argues that she intended to satisfy the statutory filing requirement by submitting the Intake Questionnaire and, therefore, we should consider it an administrative charge. The *Steffen* court proceeded from the premise that the claimant's Intake Questionnaire fit within the statutory and regulatory descriptions of a charge and concluded that the claimant's intent to "activate the Act's machinery," as well as the EEOC's treatment of the Intake Questionnaire as a charge, required the court to treat the Intake Questionnaire as a charge. 859 F.2d at 542. Both *Diez* and *Steffen*, however, involved claims of age discrimination under the ADEA, which does not require that a charge be verified. 29 U.S.C. § 626; *Diez,* 88 F.3d at 675; *Steffen,* 859 F.2d at 541. Charges under Title VII, in contrast, must be verified. 42 U.S.C. § 2000e-5(b). Whereas the Intake Questionnaires in both *Diez* and *Steffen* met the statutory description for an ADEA administrative charge, Shempert's unverified Intake Questionnaire, as discussed above, does not fit within the statutory requirements for a Title VII charge. Compare 29 U.S.C. § 626, with 42 U.S.C. § 2000e-5(b). *Diez*, therefore, does not apply to this case.

Shempert argues in the alternative that the district court erred in failing to apply the doctrine of equitable tolling to the

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(7th Cir. 1992) (relying on the misleading conduct of the EEOC to toll the statute of limitations).

180-day filing period.[8] The filing of a timely charge with the EEOC is "a requirement that, like a statute of limitations, is subject to waiver, estoppel and equitable tolling." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (*Zipes*) (footnote omitted). Equitable tolling is premised on the "excusable neglect" of the filing party, *Anderson v. Unisys Corp.*, 47 F.3d 302, 306 (8th Cir.) (*Anderson*), *cert. denied*, 516 U.S. 913 (1995), and preserves a claim after the filing period has expired. Shempert argues that the letter from the EEOC dated November 9, 1995, to which the Charge was attached, was misleading. She further argues that she could not have been expected to sign and return the Charge, sent by the EEOC on November 9, on or before the expiration of the filing period only two days later on November 11.

While Title VII is remedial legislation and its charge-filing provisions are not to be read too literally or technically, *see Zipes*, 455 U.S. at 397, "procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants." *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) (per curiam) (*Baldwin*). As a general rule, equitable tolling is a remedy reserved for circumstances that are "truly beyond the control of the plaintiff." *Hill v. John Chezik Imports*, 869 F.2d 1122, 1124 (8th Cir. 1989); *see also Lown v. Brimeyer*, 956 F.2d 780, 782 (8th Cir.) ("Equitable tolling is appropriate only when the circumstances that cause a plaintiff to miss a filing deadline are out of his [or her] hands.") (quoting *Heideman v. PFL, Inc.*, 904 F.2d 1262, 1266 (8th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991)), *cert. denied*, 506 U.S. 860 (1992). Baldwin suggests instances in which equitable tolling would be appropriate: (1) a claimant has

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[8] Defendants argue that equitable tolling was not properly raised in the district court and is not, therefore, reviewable by this court. *See Kapp v. Naturelle, Inc.*, 611 F.2d 703, 709 (8th Cir. 1979). The district court, however, noted that Shempert did assert that equitable tolling should apply but rejected that argument. Slip op. at 8 n.2. The issue of equitable tolling, therefore, is properly before this court.

received inadequate notice; (2) a motion for appointment of counsel is pending; (3) the court has led the plaintiff to believe that he or she has done everything required of him or her; or (4) affirmative misconduct on the part of a defendant lulled the plaintiff into inaction. 466 U.S. at 151.

The circumstances of Shempert's case do not justify the application of equitable tolling. At no point were circumstances out of Shempert's control. Defendants did not engage in affirmative misconduct which might have lulled Shempert into inaction. *See id.* Furthermore, Shempert controlled the timing of the Intake Questionnaire and the filing of her Charge. In addition, the EEOC did not mishandle her claim or otherwise mislead her into inaction. While Shempert argues that the third paragraph in the letter dated November 9 misled her into believing she had 30 days in which to file a charge, she acknowledges having read the entire letter which included a paragraph notifying her that a Charge had to be filed within the time limits imposed by law. Even construing the facts in her favor, equitable tolling is allowed only if the language was misleading. *See Anderson,* 47 F.3d at 306-07 ("When an administrative agency misleads a complainant, particularly one who is without the benefit of counsel, equitable tolling may be justified."). In the present case, not only did the EEOC not mislead Shempert, but she had the benefit of counsel for one full month before the filing period expired.

Furthermore, while Shempert may not have received the EEOC's letter dated November 9, 1995, to which the Charge was attached, until after the filing period expired on November 11, the fact remains that Shempert had the full 180 days to file a charge of harassment. She waited until almost two weeks before the filing period expired to complete and mail the Intake Questionnaire to the EEOC. In addition, Shempert had the advice of counsel for one full month before the filing period expired. The situation was never beyond Shempert's control so as to justify tolling the filing deadline. *See Miller v. Runyon,* 32 F.3d 386, 390 (8th Cir. 1994). Equitable tolling is not an excuse to be invoked by those failing to exercise reasonable diligence. *See Baldwin,* 466 U.S. at 151.

Shempert relies on many cases which demonstrate the appropriate application of equitable tolling. In each of those cases, equitable tolling was justified because of the misleading information provided by the agency or circumstances beyond the control of the claimant. *See Lawrence,* 132 F.3d at 451 (permitting equitable tolling because the EEOC led the claimant to believe that submitting an Intake Questionnaire within fifteen days of the expiration of the filing deadline, with subsequent verification, would suffice as a Charge); *Schlueter,* 132 F.3d at 459 (permitting equitable tolling because the EEOC mistakenly gave the claimant the wrong form, used the wrong date to calculate when the 300-day filing period would expire, and led the claimant to believe that she had done everything necessary to file a charge); *Anderson,* 47 F.3d at 306-07 (applying equitable tolling because an agency led the claimant to believe the filing period with the EEOC was one year rather than the appropriate 300 days and because the claimant was without counsel); *Warren v. Department of the Army,* 867 F.2d 1156, 1160 (8th Cir. 1989) (permitting equitable tolling because of misleading information in the EEOC's right-to-sue letter and because the claimant was without counsel). Accordingly, we hold that equitable tolling does not apply in the present case.

The last issue on appeal is Gibel's motion to intervene. A party who has not filed an administrative charge with the EEOC may still join a suit by "piggybacking" on the administrative charge of one already a party to the suit. *Anderson,* 47 F.3d at 305 n.8 (citing *Kloos v. Carter-Day Co.,* 799 F.2d 397, 400 (8th Cir. 1986)). Gibel argues that although she did not file a charge of discrimination with the EEOC, she should be allowed to "piggyback" her claim on Shempert's charge. She relies on Rule 24(b) of the Federal Rules of Civil Procedure for the proposition that intervention is allowed when the intervenor's claim has a question of law or fact in common with the main action. Because Shempert failed to file a timely charge, there is no charge upon which Gibel can "piggyback" her claim. Therefore, Gibel's motion to intervene was properly denied.

Conclusion

For the reasons stated above, we affirm the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

BRENDA SHEMPERT,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	No. H-C-96-37
	*	
HARWICK CHEMICAL	*	
CORPORATION &	*	
TOM BRECKENRIDGE,	*	
individually,	*	
	*	
Defendants.	*	

MEMORANDUM AND ORDER

This is a case of alleged employment discrimination and is brought pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.* The matter is before the Court on motion of the defendants, Harwick Chemical Corporation ("Harwick") and Tom Breckenridge, for summary judgment [doc.#19]. The plaintiff, Brenda Shempert, has responded in opposition to the motion and defendants have filed a reply to plaintiff's response. Also before the Court is the motion of Lynne Gibel to intervene [doc.#24], to which defendants have responded in opposition. Having carefully considered the matter, the Court finds that defendants' motion for summary judgment should be and hereby is granted, and that Gibel's motion to intervene should be and hereby is denied.

I.

Harwick is a corporation doing business in Wyne, Arkansas. Plaintiff was hired as a secretary by Harwick in January 1983, and was later a Senior Customer Service Representative for the corporation, having been promoted to that position some four to five years ago. Separate defendant Breckenridge serves as a Vice President within Harwick's organization and, according to plaintiff, was one of her supervisors.

In her amended complaint, plaintiff alleges that during 1994 and 1995, she was repeatedly subjected to unwelcome sexual advances, physical touching, verbal harassment, and other sexually explicit activities by Breckenridge. She states that these actions were patently offensive to her and created an intimidating, abusive, and hostile work environment. Plaintiff claims that Breckenridge used his authority to facilitate the harassment by requiring her presence in his office under the guise of discussing business matters, and that despite her repeated objections to both defendants, this harassment continued on a regular basis. She states that not only was no corrective action taken despite repeated complaints to corporate officials of Harwick, but she was encouraged to ignore the objectionable acts of Breckenridge. Plaintiff states that she was afraid for her personal health and safety as a result of the repeated harassment, and that the conditions of her employment were detrimentally altered and affected because of the harassment. She states that as a direct result of the harassment, she was forced to take a medical leave of absence and is currently under the care of a treating physician. Plaintiff tendered her resignation of employment on May 7, 1996, after instituting this action.

On October 11, 1995, plaintiff first consulted an attorney about the matters in her lawsuit. On October 30, 1995, plaintiff completed and signed an intake questionnaire ("Charge Information Form") provided by the Equal Employment Opportunity Commission ("EEOC"). In this questionnaire, which was not signed under oath or affirmation, plaintiff stated

that the last act of alleged discrimination occurred on May 15, 1995.

The EEOC received plaintiff's questionnaire on November 2, 1995. Shortly thereafter, plaintiff received from the EEOC a letter dated November 9, 1995, and with it an EEOC charge form for Plaintiff's signature. Among other things, this letter instructed plaintiff to sign and date the charge form and return it to the EEOC within thirty days in the enclosed self-addressed envelope. The letter warned plaintiff that an EEOC charge must be filed within the time limits imposed by law, and to therefore return the charge to the EEOC as soon as possible. Plaintiff signed the EEOC charge on November 16, 1995, and returned it to the EEOC on November 27, 1995. Three days later, on November 30, 1995, the charge was received by the EEOC.

On January 24, 1996, plaintiff was issued a "Notice of Right to Sue" by the EEOC, and she commenced this lawsuit on March 26, 1996. Some nine months later, on November 27, 1996, Lynne Gibel, who is represented by the same attorney as the plaintiff, filed her motion to intervene.

II.

Defendants move for summary judgment on grounds that the plaintiff failed to file a timely charge of discrimination with the EEOC and that she therefore cannot maintain this lawsuit. Separate defendant Breckenridge additionally argues that as a supervisor, he cannot be held individually liable under Title VII. Defendants argue there are no genuine issues of material fact with respect to these issues and that they are entitled to summary judgment as a matter of law.

A.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party

is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). As a prerequisite to summary judgment, a moving party must demonstrate "an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has properly supported its motion for summary judgment, the nonmoving party must "do more that simply show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). The nonmoving party may not rest on mere allegations or denials of his pleading, but must "come forward with 'specific facts showing that there is a *genuine issue for trial.*'" *Id.* at 587 (quoting Fed.R.Civ.P. 56(e) and adding emphasis). See also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co.*, 475 U.S. at 587 (citations omitted). However, "[w}here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Id.* (citation omitted).

B.

Under Title VII, a charge of unlawful discrimination must be filed with the EEOC within 180 days of the alleged discriminatory act. 42 U.S.C. § 2000e-5(e)(1). Timely filing of a charge with the EEOC is a prerequisite to maintenance of a Title VII action by an employee against an employer. *See, e.g., Owens v. Ramsey Corp.*, 656 F.2d 340, 342 (8th Cir. 1981) (citations omitted). This filing requirement is not a jurisdictional limitation, however, but instead operates in the nature of a statute of limitations and is subject to waiver, estoppel, and equitable tolling. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

In this case, there is no dispute that the latest act of alleged discrimination occured on May 15, 1995, and that the last day of the 180-day EEOC charge filing period was November 11, 1995. Plaintiff's charge, however, was not

signed until November 16, 1995, was not mailed to the EEOC until November 27, 1995, and was not received by the EEOC until November 30, 1995, all of which were well past the filing deadline. Plaintiff acknowledges these dates but nevertheless argues that her charge should be considered timely because (1) her intake questionnaire, which was submitted to the EEOC within the 180-day filing period, constituted a valid charge, and (2) the doctrine of equitable estoppel prevents application of the 180-day filing period. The Court disagrees on both points.

Although other courts of appeals have ruled to the contrary, the rule in the Eighth Circuit is that intake questionnaires in Title VII cases do not satisfy the statutory requirements for a charge because they are not verified. *Hodges v. Northwest Airlines, Inc.*, 990 F.2d 1030, 1032 (8th Cir. 1993) (stating that an unverified intake questionnaire could not serve as an administrative charge under Title VII); *Diez v. Minnesota Mining and Manufacturing Co.*, 88F.3d 672, 675 (8th Cir. 1996) (same). Therefore, plaintiff's unverified intake questionnaire, even though submitted to the EEOC within the 180-day filing period, cannot serve as an administrative charge under Title VII for purposes of the statute of limitations.[1]

Nor does the doctrine of equitable estoppel prevent application of the 180-day filing period. In Title VII cases, the statute of limitations

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[1] In *Whitekiller v. Campbell Soup, Inc.*, 925 F.Supp, 614, 616-17 (W.D.Ark.1996), case relied upon by plaintiff, the district court rejected the reasoning of *Hodges* as inconsistent with the "overwhelming authority" that allows amendment of an unverified charge to relate back to the original filing date. There is no question that *Whitekiller* supports plaintiff's argument and that *Whitekiller* conflicts with *Hodges*. Nevertheless, given a choice between conflicting decisions from a district court and the Eighth Circuit, this Court will almost always side with the Eighth Circuit. In any case, the Court would note that the Eighth Circuit in *Diez*, noting the split of authority on the issue, essentially rejected *Whitekiller* and reaffirmed the view of *Hodges*. 88F.3d at 677. *Cf. Park v. Howard University*, 71 F.3d 904, 908-09 (D.C.Cir. 1995) (citing *Hodges* for the proposition that an unsworn EEOC questionnaire does not constitute a valid charge under Title VII), *cert. denied*, 117 S.Ct. 57 (1996).

> will not be tolled on the basis of equitable estoppel unless the employees' failure to file in a timely fashion is the consequence either of a deliberate design by the employer or of actions that the employee should unmistakably have understood should cause the employee to delay filing the charge.

Garfield v. J.C. Nichols Real Estate, 57 F.3d 662, 666 (8th Cir.), cert. denied, 116 S.Ct. 380 (1995).

Plaintiff has failed to show any affirmative conduct by either the defendants or, for that matter, the EEOC that was designed to mislead or was unmistakably likely to mislead her. Plaintiff states that she met with a representative of Harwick on November 1, 1995, who told that her complaints would be addressed and a resolution reached by June 1996. Even if true, however, such a representation by Harwick does not constitute deliberate design of an employer to cause plaintiff to delay filing the charge. Indeed, prior to the November 1 meeting, plaintiff, having secured the advice of counsel, was able to complete and submit to the EEOC an unverified intake questionnaire within the 180-day filing period (even though she waited nearly five months to consult an attorney), and she was on notice from the EEOC that a charge must be filed within the time limits imposed by law, and to therefore return the charge to the EEOC as soon as possible. There is simply nothing in the record of this case to indicate affirmative conduct by the defendants or the EEOC that was designed to mislead or was unmistakably likely to mislead plaintiff.[2]

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[2] To the extent plaintiff is asserting equitable tolling as a basis for her failure to timely file her EEOC charge, the Court finds that this remedy is likewise not available to plaintiff. Equitable tolling is available when the plaintiff fails to file a timely lawsuit due to the plaintiff's "excusable neglect." *Winbush v. State of Iowa by Glenwood State Hosp.*, 66 F.3d 1471, 1477 (8th Cir. 1995) (citations omitted). *See also Hill v. John Chezik Imports*, 869 F.2d 1122, 1124 (8th Cir. 1989) (noting that courts have generally reserved the remedy of equitable tolling for circumstances that were "truly beyond the control of the plaintiff"). Plaintiff has not advanced any circumstances for her failure to timely file her EEOC charge that would constitute excusable neglect or that were otherwise beyond her control.

C.

Although the above discussion resolves the issues in this case with respect to both defendants, the Court agrees with separate defendant Breckenridge's additional argument that a supervisor cannot be held inividually liable as an "employer" under Title VII and that he is therefore entitled to summary judgment on this ground as well. In *Smith v. St. Bernards Regional Medical Center*, 19 F.3d 1254 (8th Cir. 1994), the Eighth Circuit affirmed the dismissal of a Title VII plaintiff's co-workers for failure to state a claim upon which relief could be granted, holding that liability under Title VII can attach only to employers. In *Lenhardt v. Basic Institute of Technology, Inc.*, 55 F.3d 377 (8th Cir. 1995), the Eighth Circuit noted that while it had not decided the issue of supervisor liability, the majority view is that Title VII does not provide for such liability. In this regard, Judge Eisele, in *Grissom v. Waterloo Industries, Inc.*, 902 F.Supp. 867, 870 (E.D.Ark. 1995), elected to follow the majority and what he characterized as the "better reasoned" view that a supervisor cannot be held individually liable as an "employer" under Title VII. This Court, in *Higgins v. Babcock & Wilcox*, No. LR-C-95-602 (E.D.Ark. Dec.1, 1995), and again in *Ricks v. St. Vincent Infirmary, et al.*, No. LR-C-95-647 (E.D.Ark. April 24, 1996), agreed with and adopted the reasoning of Judge Eisele. *See also Morrow v. City of Jacksonville*, Ark., 941 F. Supp. 816, 820 (E.D.Ark. 1996) (court agreed with Judge Eisele that individual supervisors are not individually liable under Title VII); *Carter v. Lutheran Med. Ctr.*, 879 F.Supp. 94 (E.D.Mo. 1995) (court followed prior decisions within the district and adopted reasoning of Ninth Circuit in finding individual supervisors not individually liable under Title VII). Therefore, because the Court finds that supervisors cannot be held individually liable as employers under Title VII, Breckenridge is entitled to summary judgment on this ground as well.

III.

There remains the question of Gibel's motion to intervene. In her motion, Gibel claims that like plaintiff, she too was subjected to sexual harassment by separate defendant Breckenridge while he was her supervisor, and she should therefore be permitted to intervene in this lawsuit. Gibel states that although she did not file a charge of discrimination with the EEOC, if at least one of the plaintiffs to the main action has properly filed a charge, an intervener may "piggyback" on that charge where there exists a similar and sufficient factual basis between the claims of the intervener and the plaintiff in the main action. Whatever merit such an argument may have as a general matter in other contexts, see, e.g., *Kloos v. Carter-Day Co.*, 799 F.2d 397 (8th Cir. 1986) (opt-in class action plaintiffs not required to personally file administrative charges if one or more of the plaintiffs in the action has properly filed an administrative charge), the Court has determined that the plaintiff in this case failed to timely file a charge of discrimination with the EEOC and that she therefore cannot maintain her Title VII action against the defendants. There is thus no EEOC charge upon which Gibel may "piggyback," and her motion to intervene must therefore be denied.

IV.

For the foregoing reasons, the Court finds that there are no genuine issues of material fact with respect to the issues raised in defendants' motion for summary judgment and that this motion should therefore be and hereby is granted. Because the Court grants defendants' motion for summary judgment, Gibel's motion to intervene must be denied as well. There being no remaining issues, this case is hereby dismissed.

IT IS SO ORDERED this 27th day of December, 1996.

_____

UNITED STATES DISTRICT COURT JUDGE

Supreme Court, U.S.
FILED
DEC 28 1998
OFFICE OF THE CLERK

No. 98-709

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BRENDA SHEMPERT and LYNNE GIBEL,

Petitioners,

vs.

HARWICK CHEMICAL CORPORATION and
TOM BRECKENRIDGE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

DEAN E. WESTMAN
Counsel of Record
MILLISOR & NOBIL CO., L.P.A.
Attorneys for Respondents
9150 South Hills Blvd.
Suite 300
Cleveland, Ohio 44147-3599
(440) 838-8800

150403

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

At the time this action commenced, the corporate defendant was Harwick Chemical Corporation. It had no parent or subsidiary companies. It has since changed its name to Harwick Standard Distribution Corporation and still has no parent or subsidiary companies.

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Respondents, Harwick Chemical Corporation and Tom Breckenridge, respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioners seeking review of the judgment of the United States Court of Appeals for the Eighth Circuit in the instant case.

INTRODUCTION

In their Petition for Writ of Certiorari, Petitioners have misstated the pertinent facts and the law that bear on the issue presented for review. Petitioners challenge the decision of the Eighth Circuit Court of Appeals, which affirmed the dismissal of Title VII claims because Petitioner Brenda Shempert ("Shempert") failed to comply with the statutory requirement that a sworn charge of discrimination be filed with the United States Equal Employment Opportunity Commission ("EEOC") within one hundred eighty (180) days after the last alleged act of discrimination. As demonstrated below, however, the Eighth Circuit has not taken a unique legal stance on any of the issues addressed in Shempert's Petition. Rather, the Eighth Circuit has taken the same approach as other circuits on the facts presented.

Prior to initiating her lawsuit, Shempert filed an Intake Questionnaire ("Charge Information Form") and a "Charge of Discrimination" with the EEOC, alleging that she had been sexually harassed. Shempert received her "Notice of Right to Sue", and brought this lawsuit against Harwick Chemical Corporation ("Harwick") and Tom Breckenridge ("Breckenridge") individually. After limited discovery directed specifically at the timeliness of Shempert's Charge of Discrimination, Harwick and Breckenridge moved for summary judgment.

Petitioner Lynne Gibel ("Gibel") subsequently filed a Motion to Intervene in the lawsuit, claiming that she had also

been sexually harassed, and that her claim had common questions of law and fact with the suit filed by Shempert. Gibel had never filed a "Charge of Discrimination" with the EEOC, but was attempting to rely on Shempert's untimely Charge.

Judge Susan Webber Wright of the United States District Court for the Eastern District of Arkansas granted Respondents' Motion for Summary Judgment, recognizing that Shempert had failed to timely file a Charge of Discrimination with the EEOC. This ruling rendered Gibel's Motion to Intervene moot. Recognizing that a supervisor cannot be held individually liable under Title VII as an "employer", the District Court also granted Summary Judgment to Breckenridge individually.

Shempert and Gibel filed a Joint Motion for Reconsideration with the District Court, which was denied. Both thereafter appealed to the Eighth Circuit Court of Appeals, but failed to pursue any claims against Breckenridge on appeal, leaving Harwick as the sole Appellee before the Eighth Circuit.

Respondents seek denial of the instant Petition for Writ of Certiorari on the grounds that the issue presented does not warrant review by this Court inasmuch as this case does not create a serious conflict among the Circuit Courts of Appeal. Furthermore, the facts of the instant dispute are distinguishable from the authority cited by Petitioners in support of their contention that the Eighth Circuit Court of Appeals has isolated itself from the majority of other Circuit Courts on the issue of the proper filing of a Charge of Discrimination with the EEOC. Finally, Respondents seek summary dismissal of the Petition for Writ of Certiorari with respect to all claims asserted against Respondent Breckenridge inasmuch as Petitioners failed to preserve the issue of his dismissal as an individual defendant in their appeal to the Eighth Circuit Court of Appeals.

LEGAL ANALYSIS

Certiorari is not warranted in this case because the ruling of the Eighth Circuit Court of Appeals, finding that Shempert failed to comply with the statutory requirement of filing a timely Charge of Discrimination with the EEOC, is supported by case law from other Circuit Courts of Appeal, is distinguishable from the case law cited by Petitioners, and does not present a conflict that "seriously interferes with the orderly, national administration of Title VII."

1. In their first and second Reasons for Granting the Writ, Petitioners misrepresent the underlying facts of this case in an effort to portray this case as being on all fours with several other cases from other jurisdictions relating to the proper filing of a timely Charge of Discrimination under Title VII. Petitioners focus their argument and analysis on many cases in which a Title VII claimant filed a charge of discrimination with the EEOC but which charge was technically deficient, for example, lacking a sworn or verified signature. In the present case, the issue presented to the Courts below was whether Shempert's completion of an EEOC Intake Questionnaire was a sufficient vehicle by which to satisfy the statutory requirement of filing a "Charge" of Discrimination. Many of the cases cited by Petitioners draw a clear distinction between the necessity of filing a *charge*, versus providing information to the EEOC via some other means, such as by letter or questionnaire. Petitioners' argument blurs this distinction between an unverified Charge and an Intake Questionnaire.

For example, in numbered paragraph (1) on page 6 of their Petition, Petitioners state that only the Eighth Circuit refuses to adhere to 29 C.F.R. § 1601.12(b), which provides for the relation back of a subsequent verification for an earlier filed charge. What Petitioners fail to mention is that, in the present

case, the relation back sought was the relation back of a verified charge to cleanse and correct the filing of an unverified, unsworn EEOC Intake Questionnaire. It is undisputed in the record that at no time during the 180 day charge-filing period did Shempert ever file a Charge — verified or unverified — with the EEOC. To the contrary, Shempert's sole action during the 180 day period was the completion of an unsworn EEOC Intake Questionnaire. This factual distinction explains the Eighth Circuit's rationale and stance on Shempert's timeliness argument.

This case, simply put, is not about Shempert filing an unsworn Charge within the statutory period and thereafter seeking to verify that Charge through the relation-back mechanism provided for in 29 C.F.R. § 1601.12(b). Instead Shempert merely completed an EEOC Intake Questionnaire during the 180 day charge filing period, but did not sign, verify or file an EEOC Charge until after the 180 days had expired. In essence, the rulings below hold, consistent with other Circuit authority, that the Intake Questionnaire was insufficient to satisfy the requirement that a timely *Charge* be filed with the EEOC and therefore, the subsequent filing of her actual Charge of Discrimination outside of the 180 day period could not "relate back" to satisfy the statutory charge filing requirement.

Indeed, this very distinction is explained in *Whitekiller v. Campbell Soup, Inc.*, 925 F. Supp. 614 (W.D. Ark. 1996). The *Whitekiller* court explained that the Eighth Circuit's position did not in effect nullify 29 C.F.R. § 1601.12(b), but instead the Eighth Circuit's rationale was that an intake questionnaire filed with the EEOC, not taken under oath, did not constitute a valid charge under Title VII, and in any event, the intake questionnaire had not been timely filed with the EEOC and therefore relation back could not cure the timeliness defect. *Id.* at 616-17.

Moreover, many of the cases cited by Petitioners to support their claim that the Eighth Circuit has taken a unique position on the issue of relation back to cure a defect in an Intake Questionnaire are distinguishable. A close review of the facts in those cases shows that in many instances, the rationale of the deciding court turned on how the Intake Questionnaire was treated by the EEOC. For instance, in *Philbin v. General Electric*, 929 F.2d 321 (7th Cir. 1991), the Seventh Circuit, in upholding the application of the relation-back principle to the filing of an Intake Questionnaire, noted:

> Recognition that the regulation [29 C.F.R. § 1601.12(b)] was within the authority of the EEOC does not mean that every intake questionnaire which is subsequently verified will constitute a charge. In this case, however, *other factors were present which fulfilled the purpose of the charge requirement.* First, the Intake Questionnaire was treated as a charge by Philbin and the EEOC. When Philbin filed the Intake Questionnaire, she signed a note indicating that she wished to file a sex discrimination charge. The EEOC accepted the questionnaire and note and assigned a charge number to the claim. Second, the EEOC then notified Philbin's employer that a charge had been filed against it. The Intake Questionnaire thus provided notice of a charge to the employer within the 300-day time period, and fulfilled one of the primary purposes of the charge and timeliness requirements. Finally, the Intake Questionnaire was signed by Philbin, although it was not under oath or affirmation. That signing nevertheless provided an affirmation by Philbin of the allegations of the questionnaire. Those factors, in conjunction with the subsequent verification of the formal charge,

> fulfilled the purposes of the charge requirement and complied with the statutory requirement that the charge be in writing and under oath.

Id. at 324 (emphasis supplied). Moreover, the court in *Philbin* found that the EEOC had sent Philbin a completed Charge form, but did not afford her enough time to return the charge within the 300-day filing period. Thus, the Seventh Circuit held that "the EEOC's inaction in completing and forwarding the formal charge in a timely manner should not bar the plaintiff from proceeding on her Title VII claim." *Id.* at 325.

This same distinction between Intake Questionnaires and Charge forms exists in many of the additional cases cited by Petitioners, and emphasizes the clear dichotomy in the case law between the EEOC's treatment of an Intake Questionnaire as an *ipso facto* Charge of Discrimination versus treating the Questionnaire as merely a preliminary tool used to elicit information for later incorporation into the complaining party's Charge of Discrimination. *See, e.g., Early v. Bankers Life and Casualty Co.*, 959 F.2d 75 (7th Cir. 1992) (recognizing distinction in how EEOC treats the Intake Questionnaire either as charge *per se* or preliminary step to filing of a charge); *Perkins v. Marshall, Silverstein*, 939 F.2d 463, 470 (7th Cir. 1991) (upholding dismissal of Title VII claim where intake questionnaire was not treated as charge by EEOC and therefore no timely charge was filed); *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534 (7th Cir. 1988) (Seventh Circuit rejects argument that "virtually every completed Intake Questionnaire . . . would fall within the definition of a charge. . . . [T]he EEOC does not routinely treat Intake Questionnaires as charges. . . . Moreover, the relevant decisionmakers at the EEOC plainly did not treat Steffen's Intake Questionnaire as a charge."); *Price v. Southwestern Bell Telephone Co.*, 687 F.2d 74 (5th Cir. 1982) (EEOC treated intake form as charge); *EEOC v. Appalachian*

Power Co., Inc., 568 F.2d 354 (4th Cir. 1978) (affirming dismissal of Title VII for failure of plaintiff to have filed a charge in writing under oath or affirmation as required by 42 U.S.C. § 2000e-5(b); *Halas v. Ford Motor Company*, 987 F. Supp. 227 (W.D. N.Y. 1997) (ADA questionnaire treated as charge and plaintiff told by EEOC that he was not late in filing charge); *Bacon v. Allstate Insurance Company*, No. 93 C 1701, 1995 U.S. Dist. LEXIS 8168 (N.D. Ill. 1995) (EEOC assigned letter charge number, notified employer of charge, but plaintiff never verified underlying charge prior to issuance of right to sue letter); *Ferch v. Syncor Int'l Corp.*, 1990 U.S. Dist. LEXIS 5428 (N.D. Ill. 1990) (court rejected plaintiff's request to treat charge receipt affidavit as equivalent of a sworn charge, citing 29 C.F.R. § 1601.12(b) to support its rationale that "where the original unsworn submission is not a 'charge,' the filing of a sworn charge after the expiration of the 300 days will not cure the defect.").

2. Contrary to Petitioners' assertion in their Third Reason for Granting the Writ, the decision of the Eighth Circuit Court of Appeals in the instant matter was not erroneous, but instead represents a well-reasoned decision that the deference to be afforded to the EEOC in the interpretation of its implementing regulations is limited by the language of the controlling statute, here 42 U.S.C. § 2000e-5(b). Specifically, section 2000e-5(b) provides that a valid charge "shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." The Eighth Circuit fashioned its decision in the instant matter so as not to negate the statutory mandate that a charge of discrimination be under oath or affirmation.

Furthermore, the Eighth Circuit did not err in refusing to rescue Shempert's claim by applying equitable tolling principles. Indeed, the same day the Eighth Circuit decided this

matter, it decided two similar appeals on the issue of compliance with the charge filing requirements of Title VII, both of which cases were decided against the employer on equitable tolling grounds. In *Lawrence v. Cooper Communities*, 132 F.3d 447 (8th Cir. January 6, 1998), the plaintiff, after receiving advice from an attorney, filled out a charge information form ("CIF"), placed her unverified signature on the form, and sent the CIF to the EEOC's office. After receiving the CIF, the plaintiff was advised by the EEOC that an "unperfected charge" had been filed and that the EEOC would send her a copy of the perfected charge when it was completed. By the time the actual charge was sent to the plaintiff for her review and signature, however, the 180 day charge filing period had lapsed.

The Eighth Circuit in *Lawrence* held that the charge was not timely filed. The court decided, however, that the plaintiff was entitled to an equitable tolling of the filing period because she sent in the CIF within the filing period and it was reasonable for her to rely on the EEOC's erroneous belief that the charge could be perfected outside the 180 day period. The court also relied upon the fact that it was the EEOC, and not the plaintiff, who failed to complete the formal charge form and obtain the plaintiff's verification until after the 180-day period had expired. Ultimately, the court found that the EEOC misled the plaintiff into believing that she had timely met all of the filing requirements and for that reason invoked the doctrine of equitable tolling.

Again in *Schlueter v. Anheuser-Busch, Inc.*, 132 F.3d 455 (8th Cir. January 6, 1998), the plaintiff, who likewise had received pre-charge counseling from an attorney, went to the EEOC office for the purpose of filing a charge of discrimination. The plaintiff expressed her intent to an EEOC employee, who asked her to fill out an Intake Questionnaire. After filling out the questionnaire, the EEOC employee advised her that she

would have to return at some point to fill out additional paperwork. The plaintiff then made an appointment to come back at a later date. When she returned for this second appointment, she was asked to fill out and sign the charge, which the EEOC employee filed on that same date — a date which was beyond the 180-day filing period.

On appeal, the Eighth Circuit held that the intake questionnaire the plaintiff filed did not satisfy the statutory requirement of filing a timely charge. Moreover, the court found that the charge which was eventually filed was untimely. Nonetheless, the court agreed with the plaintiff that the filing period should be equitably tolled because she told the EEOC employee of her intent to file a charge when she first went to the EEOC office. The court indicated that it would not hold the plaintiff responsible for the intake officer's erroneous belief that the charge the plaintiff eventually signed would relate back to the filing of the intake questionnaire.

These two cases are factually distinguishable from the case at bar inasmuch as it was not the EEOC which led to Shempert's late filing of her Charge, but rather her own failure and that of her lawyer to respond to the EEOC's instructions to file the charge within the time period required by law. This distinguishing factor was paramount to the Eighth Circuit and for that reason alone the Eighth Circuit's decision is sound and should remain undisturbed.

Finally, Petitioners' representation that there has been extensive litigation involving the issue at bar is misleading at best. A close review of the cases cited in the Petition shows that numerous issues regarding the relation-back of charges have arisen in contexts that are not implicated here and cannot be reviewed given the limited facts of the instant dispute. *See e.g., Tinsley v. First Union Nat'l Bank*, 155 F.3d 435 (4th Cir.

1998) (holding plaintiff's charge timely filed within 300 day limitations period); *Balazs v. Liebenthal*, 32 F.3d 151 (4th Cir. 1994) (relation back addressed post-issuance of right to sue notice); *Crites v. Kaiser Aluminum and Chem. Corp.*, No. 91-1231, 1992 U.S. App. LEXIS 6220 (4th Cir. 1992) (EEOC instructed plaintiff to return signed formal charge within thirty days which fell outside charge filing period); *Roberts v. Arizona Bd. of Regents*, 661 F.2d 796 (9th Cir. 1981) (addressing equitable tolling in context of EEOC failure to defer charge to state FEP agency); *DeMatteis v. Eastman Kodak Co.*, 520 F.2d 409 (2d Cir. 1975) (EEOC misrepresentation regarding timely filing of federal lawsuit following receipt of right to sue letter); *Danley v. Book-Of-The-Month-Club*, 921 F. Supp. 1352 (M.D. Pa. 1996) (underlying charge not verified until after right-to-sue notification issued by EEOC); *NAACP v. Laborers' International Union*, 902 F. Supp. 688 (W.D. Va. 1995) (involving charge filed with OFCCP instead of EEOC).

3. In their third argument in support of their Petition, Petitioners also claim that the statute is "ambiguous" and that the EEOC reasonably has interpreted that "ambiguity" as allowing relation back in virtually all circumstances. Yet, a review of the statutory language belies the assertion of an ambiguity. Indeed, the statute unequivocally states that a charge must be sworn. Supportive of the Eighth Circuit's analysis here is the observation of the District of Columbia Circuit that: "[a] court cannot allow liberal interpretation of an administrative charge to permit a litigant to bypass the Title VII administrative process". *Park v. Howard University*, 71 F.3d 904, 907 (D.C. Cir. 1995), *cert. denied*, 519 U.S. 811 (1996). Effectively, Petitioners seek to rely upon the rationale of unrelated cases that involved different facts and circumstances but which have led to the application of the relation-back principle and/or equitable tolling.

Furthermore, Petitioners' argument that the Eighth Circuit erred in its refusal to equitably toll the charge-filing period again is unsupported by the cited case law. A close review of the cases renders the present dispute distinguishable by virtue of several facts. First, Shempert was represented by counsel throughout the period in question. Second, the EEOC did not make any affirmative representation to Shempert that she had complied with the charge-filing requirements. Third, the EEOC's instructions to Shempert were not misleading and cannot support a claim that the EEOC's conduct led to her failure to timely file her charge. Indeed, the EEOC instructed Shempert that she had to comply with the time-limits imposed by law. To be sure, Shempert and certainly her counsel were therefore notified that merely returning the executed charge itself within 30 days was not necessarily adequate to protect her interests. *Cf., e.g., Roberts v. Arizona Bd. of Regents*, 661 F.2d 796, 799 (9th Cir. 1981) (EEOC violated its own procedural regulations regarding deferral to state agency therefore equitable estoppel applied); *White v. Dallas Independent School Dist.*, 581 F.2d 556, 562 (5th Cir. 1978) (equitable estoppel applied where EEOC represented to plaintiff that "timeliness and All other requirements have been met"). This very distinction was examined in *Gonzalez v. Hoechst Celanese*, No. C-97-125, 1997 U.S. Dist. LEXIS 21522 (S.D. Tex. 1997), in which the court recognized that courts have allowed unsworn claims to constitute "charges" for purposes of Title VII jurisdiction where either (1) the EEOC treats the unsworn statement as a claim or (2) the EEOC makes a mistake in handling the unsworn claim causing the claimant to miss the deadline to file a timely formal charge. *See Id.* at *12-13. The court rejected the plaintiff's claim as failing to meet either of these requirements, stating:

> [w]here a claimant fails to file before the deadline due to his or her own mistake rather than the

> inducement of the EEOC or employer, it is not appropriate to apply the doctrine of equitable tolling.

Id. at *16-17. That principle is directly applicable to the facts herein, and supports the Eighth Circuit's decision.

CONCLUSION

For each and all of the foregoing reasons, Respondents respectfully submit that the Petition for Writ of Certiorari should be denied in the instant case.

Respectfully submitted,

DEAN E. WESTMAN
Counsel of Record
MILLISOR & NOBIL CO., L.P.A.
Attorneys for Respondents
9150 South Hills Blvd.
Suite 300
Cleveland, Ohio 44147-3599
(440) 838-8800

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OCTOBER TERM, 1998

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Harwick Standard Distribution Corporation and
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Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY OF THE PETITIONER

Jonathan D. Schiller
Thomas C. Goldstein
Samuel C. Kaplan
BOIES & SCHILLER LLP
5301 Wisconsin Ave., NW
Suite 570
Washington, DC 20015

David Boies
(Counsel of Record)
BOIES & SCHILLER LLP
80 Business Park Dr.
Suite 110
Armonk, NY 10504
(914) 273-9800

January 12, 1999

Balmar Legal Publishing Services, Washington, D.C. (202) 682-9800

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REPLY OF THE PETITIONER

CERTIORARI SHOULD BE GRANTED AS TO QUESTION ONE

Respondents are wrong to contend that Petitioners have misconstrued the Eighth Circuit's holding in this case and to assert that the circuits are not in fact divided over whether a complainant's unverified Title VII "charge" may be cured by an untimely, but verified, charge. "Charges" must be filed within 180 days of the last alleged act of discrimination, must contain various information about the allegation of discrimination, and must be sworn or verified. In this case, Petitioner Brenda Shempert ("Petitioner") timely filed an official EEOC "Intake Questionnaire" (also referred to as a "Charge Information" form) which set forth all of the information that the Commission requires to establish a "charge." Although Petitioner did not verify the charge's contents until after 180 days, the EEOC appropriately treated her submission as a sufficient "charge" under its regulations. The Eighth Circuit, however, held that Petitioner's charge was invalid because she failed to verify it within the 180-day period.

Respondents' contrary view of the decision below is erroneous. The Brief in Opposition ("BIO") maintains that this case "is not about Shempert filing an unsworn Charge within the statutory period and thereafter seeking to verify that Charge." BIO 4. Instead, Respondents maintain, the Eighth Circuit affirmed the dismissal of Petitioner's Title VII action because, "[i]n essence," her "Intake Questionnaire was insufficient to satisfy the requirement that a timely *Charge* be filed with the EEOC." *Id.* (emphasis in original). Respondents thus rely entirely on a claimed distinction between the substance of Petitioner's EEOC Intake Questionnaire (which Respondents maintain could not constitute a valid "Charge") and her "Charge of Discrimination" form (which Respondents maintain is the only valid "Charge" under the statute). But as we explain in detail below, Respondents' contention is contradicted by Title VII itself, the EEOC's implementing regulations, the

Commission's conduct in this case, the district court's decision, the holding of the Eighth Circuit, and the uniform decisions of other circuits. In reality, as the Petition explained, the decision below conflicts with the holdings of six other circuits and is erroneous. This Court therefore should grant certiorari.[1]

1. **Under the EEOC's procedures, an Intake Questionnaire that satisfies 29 CFR 1601.12(b) constitutes a "charge."** The Title VII complaint process begins when a complainant files a "charge" with the EEOC. The charge must "be filed within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 USC 2000e-5(e)(1). The statute provides that "[c]harges shall be in writing under oath or affirmation." *Id.* 2000e-5(b). Beyond that direction, however, Congress left it to the EEOC to determine the contents of a "charge." *Id.* 2000e-5(b) (charges "shall contain such information and be in such form as the Commission requires").

The EEOC does not require that a complainant file her "charge" in any particular form. To the contrary, "a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 CFR 1601.12(b). To facilitate the complaint process, the Commission has promulgated an "Intake Questionnaire," which also is referred to as a "Charge Information" form. *See* EEOC Br. 2, 16. If the Intake Questionnaire sets forth sufficient detail about the complainant's allegations, the Commission may (as in this case) fill out and provide to the complainant a "Charge of Discrimination" form

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[1] Given the fact-specific claims raised by the BIO, we contemporaneously are lodging with the Clerk of this Court a copy of the EEOC's Brief as *Amicus Curiae* in the Eighth Circuit (cited as "EEOC Br."), as well as relevant excerpts from the record below (cited as "Petrs' Lodging"). Moreover, by reviewing the EEOC's Brief, the Court can avoid the substantial delay occasioned by inviting the Solicitor General to file a further brief, which would make it impossible to hear this case this Term. Petitioner's effort to see her day in court already has been delayed for more than three years.

to be signed, verified, and returned. Pet. App. 3a; EEOC Br. 3.[2]

Thus, there is no basis for Respondents' assertion that an "Intake Questionnaire" such as Petitioner filed in this case does not satisfy the requirements of a Title VII "charge." An Intake Questionnaire provides "a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of" (29 CFR 1601.12(b)). Respondents' view also is insupportable because the Charge of Discrimination form is derived directly from, and therefore contains *no more information* than,[3] the Intake Questionnaire. Moreover, because the EEOC creates the Charge of Discrimination form on its own timetable, Respondents' construction would leave complainants entirely at the mercy of the Commission to provide that form in time to be returned within the 180-day period. Thus, the EEOC recognized in this case that, because it mailed the Charge of Discrimination form to Petitioner only two days before the 180-day period expired, "it is highly unlikely that Shempert was provided with a formal charge form in time to verify and file it prior to the expiration of the filing period, even though she came to the EEOC in a timely manner." EEOC Br. 18.

2. **Petitioner Shempert's Intake Questionnaire constituted a "charge."** In this case, Petitioner Shempert filed her EEOC Intake Questionnaire within the 180-day period. Pet. App. 3a. The form makes no provision for it to be verified or sworn. *See* Petrs' Lodging, at bates 0104. There never has been any question, however, that the Intake Questionnaire satisfied the requirements of 29 CFR 1601.12(b). As the EEOC explained, "In this case, Shempert's initial submission satisfied

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[2] If the Intake Questionnaire does not provide sufficient information, the Commission presumably may request that the complainant provide additional details in order to establish a sufficient "charge." This, however, is not such a case.

[3] In this case, for example, the Intake Questionnaire submitted by Petitioner "described [Petitioner's allegations] in greater detail than the subsequently filed formal charge." EEOC Br. 8.

the requirements of the regulation." EEOC Br. 5. The Commission thus "treated Shempert's correspondence as a charge—giving [Respondent] Harwick notice on November 20, 1995, that a charge had been received, and assigning a charge number." *Id.* at 2.[4]

Two days before the 180-day period ended, the Commission took the information that Petitioner provided in her Intake Questionnaire and created a "Charge of Discrimination" form, which it sent to Petitioner with the request that she sign and date it. Pet. App. 3a-4a. The form contained only one express reference to the number of the days within which Petitioner was required to act: "[F]ailure to respond or furnish the requested information within thirty (30) days from the date of this letter, may result in your charge being dismissed for failure to cooperate." Petrs' Lodging, at bates 0097. Petitioner did as directed and furthermore verified the form's accuracy in the field provided. *Id.* at 0096. Petitioner did not mail the verified Charge of Discrimination form to the EEOC until sixteen days after the 180-day period had expired. Pet. App. 3a-4a. Under the EEOC's regulations, however, this filing nonetheless cured the fact that her initial Intake Questionnaire was unverified. *See* 29 CFR 1601.12(b) ("A charge may be amended to cure technical defects or omissions, including failure to verify the charge . . . . Such amendments . . . will relate back to the date the charge was first received.").

3. **The district court and Eighth Circuit ruled against Petitioner only because her charge was not verified in time.** The district court dismissed Petitioner's subsequent Title VII action against Respondents for failure to file a sufficient charge

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[4] Respondents' bald assertion that "[i]t is undisputed in the record that at no time during the 180 day charge-filing period did Shempert ever file a Charge – verified or unverified – with the EEOC" (BIO 4) is astonishing and insupportable in light of the EEOC's express position, as quoted in the text. Nor do Respondents allude to a single piece of information required by 29 CFR 1601.12(b) that Petitioner failed to provide in her Intake Questionnaire. Finally, neither the district court nor the court of appeals accepted Respondents' contention.

within 180 days. But contrary to Respondents' contention in the Brief in Opposition, the district court never suggested that Petitioner's Intake Questionnaire failed to provide the information required by 29 CFR 1601.12(b). Instead, the district court recognized that it was bound by Eighth Circuit precedent that "an *unverified* intake questionnaire could not serve as an administrative charge under Title VII" (Pet. App. 16a (citing *Diez v. Minnesota Mining & Mfg. Co.*, 88 F.3d 672, 675 (8th Cir. 1996); *Hodges v. Northwest Airlines*, 990 F.2d 1030, 1032 (8th Cir. 1993) (emphasis added)) although it recognized that "other courts of appeals have ruled to the contrary" (*id.*). The district court therefore refused to follow the EEOC's regulation, under which Petitioner's charge would have been valid. *Id.*

On appeal, the Eighth Circuit affirmed. Petitioner, supported by the EEOC as *amicus curiae*, explained that her Intake Questionnaire provided all the substantive information necessary to constitute a "charge" under 29 CFR 1601.12(b). Pet. C.A. Br. 5-6; EEOC Br. 5. Contrary to Respondents' contention, the court of appeals never doubted that Petitioner's "Intake Questionnaire qualified as an administrative charge because it was a precise statement identifying the parties and describing the discriminatory activities, as required by 29 CFR § 1601.12(b)." Pet. App. 5a. Instead, the Eighth Circuit explained that "Intake Questionnaires *which are neither signed under oath nor verified* do not satisfy the statutory requirement for an administrative charge." *Id.* 6a (emphasis added). As an earlier Eighth Circuit decision explains, that court's rationale is not that Intake Questionnaires lack the substantive information required to constitute a charge, but instead that "intake questionnaires do not satisfy the statutory requirements for a charge *because they are not verified.*" *Diez v. Minnesota Mining & Mfg. Co.*, 88 F.3d 672, 675 (1996) (emphasis added). In fact, the court of appeals in this case explicitly recognized that a *sworn* "Intake Questionnaire" would constitute a sufficient "charge" under the statute. *Id.* ("Only when an Intake Questionnaire is signed under oath can it constitute a valid charge

under Title VII for purposes of the statute of limitations." (emphasis added) (quotation marks omitted)).[5]

4. **The Eighth Circuit's holding creates an important and recurring circuit conflict.** The decision below squarely conflicts with the holdings of other circuits, which have sustained the EEOC's regulation permitting relation back. These circuits hold that a sworn charge will cure a timely but unsworn charge, including an unsworn Intake Questionnaire. *See generally* Pet. 6-8. Just as the district court recognized this conflict (*see supra* at 5), so did the Eighth Circuit: "Other circuits have held that a timely-filed *Intake Questionnaire* can serve as an administrative charge if subsequently verified. Still other circuits have held that an *Intake Questionnaire* qualifies as a charge if it satisfies the requirements of 29 C.F.R. § 1601.12(b)." Pet. App. 6a (citations omitted) (emphasis added). The Seventh Circuit accurately synthesized the state of the law prior to the Eighth Circuit's ruling:

> [T]he central issue in this case is whether the timely Intake Questionnaire in conjunction with the subsequently-filed charge satisfied the statutory time bar for Title VII claims. A number of other circuits have addressed the issue, and *all* have found that the timely-filed Intake Questionnaire which is subsequently

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[5] Nothing in *Whitekiller v. Campbell Soup*, 925 F. Supp. 614 (W.D. Ark. 1996), supports Respondents' contrary position. Respondents read *Whitekiller* to hold that, under Eighth Circuit precedent, "an intake questionnaire filed with the EEOC, not taken under oath, [does] not constitute a valid charge under Title VII." BIO 4. In fact, the district court in *Whitekiller* construed the Eighth Circuit's refusal to permit relation back in *Hodges v. Northwest Airlines*, 990 F.2d 1030 (1993), as dictum. *Whitekiller*, 925 F. Supp. at 616-17. But *Whitekiller*'s reading of *Hodges* proved incorrect. As the district court in this case explained "[t]here is no question . . . that *Whitekiller* conflicts with *Hodges*." Pet. App. 16a n.1. Moreover, the Eighth Circuit's subsequent decision in *Diez v. Minnesota Mining & Mfg. Co.*, 88 F.3d 672, "noting the split of authority on the issue, essentially rejected *Whitekiller* and reaffirmed the view of *Hodges*." *Id.* Importantly, *Whitekiller* expressly recognized that this interpretation of Title VII conflicts with "the overwhelming authority" to the contrary and renders "29 C.F.R. § 1601.12(b) . . . invalid." 925 F. Supp. at 616.

> verified satisfies the statutory requirement that the charge be under oath or affirmation.
>
> . . . . The circuit courts of appeals that have addressed the issue hold that the EEOC has the power to decide that a subsequent verification of a written statement relates back to the date of the initial filing and satisfies the statutory requirement. *See e.g., Peterson v. City of Wichita, Kansas*, 888 F.2d 1307 (10th Cir. 1989); *Price v. Southwestern Bell Telephone Co.*, 687 F.2d 74, 77-78 n.3 (5th Cir. 1982); *Casavantes v. California State University, Sacramento*, 732 F.2d 1441 (9th Cir. 1984).

Philbin v. GE Capital Auto Lease, 929 F.2d 321, 323 (1991) (emphasis added); *see also Peterson v. City of Wichita, KA*, 888 F.2d 1307, 1308-09 (10th Cir. 1989) (as of 1989, "Every circuit which ha[d] considered the issue ha[d] decided in favor of the validity of the regulation, concluding that an unverified charge is a timely filing if it is subsequently amended by a charge executed under oath or affirmation"), *cert. denied*, 495 U.S. 932 (1990). As the Petition noted (at 10 n.10), a panel of the Eighth Circuit in *Schlueter v. Anheuser-Busch*, 132 F.3d 455, 458 (1998), recognized that the view of those circuits "appears well taken," but found that it was "bound by Eighth Circuit case law" to the contrary.

5. **Certiorari also is warranted because the Eighth Circuit's decision is erroneous.** Respondents state in defense of the ruling below only that "[t]he Eighth Circuit fashioned its decision in the instant matter so as not to negate the statutory mandate that a charge of discrimination be under oath or affirmation." BIO 7. That is no answer. All agree that the charge must be sworn or verified. The crucial point is that although Title VII "does require that a complainant verify a charge, the statute does *not* require that the verification take place prior to the expiration of the [180-day] time period." *Philbin, supra*, 929 F.2d at 324 (emphasis added). The purpose of the charge is to provide "an adequate factual basis for the Commission's initiation of the investigatory and conciliatory

procedures contemplated by Title VII." *Price v. Southwestern Bell Telephone Co.*, 687 F.2d 74, 78 (5th Cir. 1982). That purpose is satisfied when the complainant timely files a sufficient charge on the Commission's own form, even though the form makes no provision for swearing or verification. Nor do Respondents contest that the decision below conflicts with this Court's unanimous conclusion in *Zipes v. TWA*, 455 U.S. 385, 396-97 (1982), that Title VII's filing deadlines should be construed liberally in light of the statute's remedial purposes. Given that remedial purpose, deference should be accorded to the EEOC's interpretation that the statute permits the relation back of subsequently verified charges of discrimination.

6. **The question presented by the Petition is ripe for review in this Court.** The conflict in the circuits is clear and acknowledged. The Eighth Circuit has developed its position through five separate decisions,[6] and no further percolation of the issue is required before this Court resolves the division in the courts of appeals. Moreover, the issue recurs frequently: it potentially affects thousands of initially unverified charges filed by complainants each year. Failure to resolve the conflict therefore would interfere substantially with the national administration of Title VII. The Petition also collected (at 9 n.9) more than a dozen district court decisions confronting the issue within the past several years alone. This is a particular concern given that the Title VII complaint process frequently is invoked by individuals proceeding without counsel. Finally, the Eighth Circuit's position is so clearly erroneous that certiorari likely would be granted only in a case from that court in order to reverse. No other vehicle to address the question is apparent.

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[6] Pet. App. 1a; *Schlueter v. Anheuser-Busch*, 132 F.3d 455 (1998); *Lawrence v. Cooper Communities*, 132 F.3d 447 (1998); *Diez v. Minnesota Mining & Mfg. Co.*, 88 F.3d 672 (1996); *Hodges v. Northwest Airlines*, 990 F.2d 1030 (1993).

CERTIORARI SHOULD BE GRANTED AS TO QUESTION TWO

The second question presented by the Petition is whether Petitioner's charge was timely filed under the doctrine of equitable tolling. Respondents recognize that the Eighth Circuit has applied equitable tolling in two decisions that cannot be distinguished from this case. In *Schlueter v. Anheuser-Busch*, 132 F.3d 455, 459 (1998), "the EEOC considered Schlueter's Intake Questionnaire to be a valid charge (or believed that her charge would relate back to the completion of the Intake Questionnaire)." The court applied equitable tolling, explaining: "Whichever of these beliefs the EEOC may have held, they were mistaken, and we will not hold Schlueter responsible for the EEOC's mistake." *Id.* In *Lawrence v. Cooper Communities*, 132 F.3d 447, 451 (1998), "[t]he EEOC believed that, pursuant to § 1601.12(b), the completed charge would relate back to the CIF's [Intake Questionnaire's] filing for timeliness purposes." The court applied equitable tolling because "[a]lthough Lawrence sought the advice of an attorney prior to contacting the EEOC and may have been generally aware of her rights, we find that the EEOC misled Lawrence into reasonably believing that submitting her CIF within fifteen days of the 180-day filing deadline, with subsequent verification, would suffice." *Id.*[7]

There is no basis for applying equitable tolling in *Schlueter* and *Lawrence*, but not in this case. The Commission treated Petitioner's Intake Questionnaire as a charge and has acknowledged mailing the "Charge of Discrimination" form to her only two days before the statutory deadline. EEOC Br. 18. The Commission moreover wrote to Petitioner that she must return the verified Charge of Discrimination form within thirty days, which she did. Although the Commission also wrote that Peti-

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[7] Although it is not a significant point, *Lawrence* and *Schlueter* were decided more than six months before this case. *Contra* BIO 8 (*Lawrence* and *Schlueter* were decided "the same day the Eighth Circuit decided this matter").

tioner was required to comply with the "time limits set by law" (Petrs' Lodging, at bates 0097), certainly she was entitled to rely on the Commission's own binding regulation, which permits relation back of verified charges, as an accurate statement of "the time limits set by law."

We recognize that certiorari usually is not granted to resolve such intra-circuit conflicts. But the holding below also conflicts with long-standing authority from other circuits that equitable tolling applies when a party reasonably relies on an agency regulation. *See* Pet. 10-11. In any event, the refusal of the panel below to apply equitable tolling is bound up with its refusal to permit relation back under 29 CFR 1601.12(b). Thus, if certiorari is granted as to Question One, it should also be granted as to Question Two.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Jonathan D. Schiller
Thomas C. Goldstein
Samuel C. Kaplan
BOIES & SCHILLER LLP
5301 Wisconsin Ave., NW
Suite 570
Washington, DC 20015

David Boies
(Counsel of Record)
BOIES & SCHILLER LLP
80 Business Park Dr.
Suite 110
Armonk, NY 10504
(914) 273-9800

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